

No. 252.

Brief of Atty. Gen.

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(Signature) for  
Clark,

G. W. Williams.

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In the Supreme Court of the United States.

OCTOBER TERM, 1898.

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JOHN W. COLLIER, ADMINISTRATOR OF  
James E. Ranck, deceased, appellant,

v.  
THE UNITED STATES AND APACHE  
Indians.

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## BRIEF OF APPELLEES.

The substantial objection of the appellants to the judgment of the Court of Claims dismissing their petition is that the court was not warranted in such judgment by the evidence in the case.

It is submitted that this question is not reviewable by the Supreme Court.

In addition to this assignment of error the appellants contend that documentary evidence establishing the condition of the defendant Indians relative to their status as to amity is not competent evidence.

## I.

Appellants, at the bottom of page 2, erroneously state that the identity of the depredating Indians was determined by the general reports of Army officers to the

War Department. To quote the language of counsel, on said page 2 of their brief it is stated :

The Court of Claims, upon documentary evidence set forth in the finding, which consists of general reports of Army officers to the War Department, conclude that the depredation was committed by a band of Mescalero Apache Indians who were not in amity with the United States, and dismissed the petition for want of jurisdiction. (Record, pp. 3-9.)

This shows a total misconception of the findings made by the court. The record does not show that the court found that the depredating Indians were Mescalero Apaches from the extracts following such finding on page 3 of the record.

This finding is in the following words and figures, to wit :

The alleged depredation was committed on or about the second day of March, 1869, in the south-eastern part of the Territory of New Mexico by Mescalero Apache Indians, who, at the time and place, were not in amity with the United States. The property so taken by the Indians was worth more than the sum of three thousand dollars (\$3,000).

The court determines that the Mescalero Apache Indians were not in amity at the time of the depredation from the following official reports, documents, and facts deduced from the testimony of witnesses which are set forth in the findings. \* \* \*

Following these findings are various reports from which the court determines *not that the Mescalero Apache Indians committed the depredation, but that the Mescalero Apache Indians were not in amity with the United States* at the date of the commission of the alleged depredation.

The first finding of the court is a finding of the ultimate fact that the depredation was committed by the Mescalero Apache Indians, which finding was evidently made upon the whole record and without reference to the extracts referred to. The extracts may have entered into the consideration of the question of identity, but it is not stated by the court in such finding that it was made solely upon these extracts. In fact it is not stated by the court upon what facts they find the ultimate fact that the Mescalero Apache Indians were the depredators.

It is insisted that this ultimate fact found by the Court of Claims upon the whole record, which record is not and could not properly be before this court, is not reviewable on appeal.

## II.

If this court is authorized to review the finding made by the court upon the fact of the status of the defendant Indians with reference to their condition as to amity, it is submitted that the record offered on appeal is ample to show that the Court of Claims was without jurisdiction to entertain this suit because the Mescalero Apache Indians were not in amity with the United States at the date of the commission of the alleged depredation, and such want of amity appears on the face of the records submitted.

In *Marks v. The United States* (161 U. S. R., 297) this court has adjudicated upon the question of amity, defining the meaning of the word as it appears in the Indian depredation act of March 3, 1891.

The courts say \* \* \*

The word "amity" is not a technical term. It is a word of common use; and such words, when found in the statute, must be given their ordinary meaning, unless there be something in the context which compels a narrow or different scope. Webster defines it, "friendship in a general sense between individuals, societies, or nations; harmony; good understanding, as a treaty of amity and commerce." \* \* \*

The record containing the extracts from the public documents, from pages 3 to 8, shows that the Mescalero Apache Indians at the date of the alleged depredation were not in this state of friendship and good will toward the Government. They had left their reservation in 1865, and on October 8, 1869, Bvt. Maj. Gen. George W. Getty reported that—

The great pests of the district have been the Mescalero Apaches, who infest all the southern portion of the Territory and sometimes extend their operations in small parties as far north as Santa Fe. (Rec., p. 3.)

By this report it also appears that 62 scouts had been sent out against the Apache Indians between June 30, 1868, and October 8, 1869, with the result of 6 Indians being killed, 5 wounded, 3 made prisoners, 111 animals and large quantities of provisions, ropes, arms, and utensils usually found in Indian camps captured. This report on page 4 states that these scouts were mainly directed against the Mescalero Apaches.

The Commissioner of Indian Affairs, on page 4 of the record, states that the Mescalero Apaches escaped from their reservation in 1865, since which time they have

been guilty of a number of murders and depredations. Before their escape from the reservation, he states that they were peaceable and friendly. It is also reported that, by reason of the mountainous character of their country, it was difficult for the troops to find them, showing that they were being operated against by the troops, as stated in General Getty's report supra.

Again, on page 4 of the Record, Lorenzo Labadi, United States Indian agent, states that since his last report the Mescalero Apaches have not visited his agency.

Again, on page 5 of the Record, it is stated by the report set forth on said page, that from July 23 to August 31, 1869, the agent had not seen an Indian of the tribe (Mescalero Apaches).

Again, on page 6 of the Record, it is stated that—

It is a very difficult matter for the troops at the post to find these Indians, on account of the large extent of the mountainous country over which they range; but Lieut. Col. Frank Stanwood, captain Third United States Cavalry, left this post with a detachment of 65 men of the Third Cavalry on the 25th day of last July on a scouting expedition, passed through the country infested with these Indians, and went as far as Fort Bliss, Tex., and it was by accident that a party of four or five Indians was seen by the command during the time.

This indicates further military operations against the defendant Indians. On page 7 of the Record will be found the report of Bvt. Maj. Alex. Moore, United States Army, which shows an expedition into the Mescalero country under the command of General Brooke.

Again, on page 8 of the Record, it is stated by Indian Agent John P. Plum that the depredation was committed in the section of country roamed over by the Mescalero Apache Indians.

On page 8 of the Record is found the report of Fletcher J. Cowart, United States Indian Agent, which shows the presentation of the claim to the Apache Indians on the 4th of February, 1887, eight years after the commission of the alleged depredation, at which time the Indians in counsel denied the commission of the depredation. It may added, parenthetically, that it could hardly be expected of the Indians that they would admit the commission of the offense.

At the top of page 9 of the Record is found the conclusion that the court reached from the testimony in the case, which is as follows:

At the time of the depredation the cattle were in charge of the employees of the decedent, being driven from Mason County, Tex., to New Mexico, and were taken by the Indians and driven in the direction of the Guadalupe Mountains, New Mexico. The number of Indians at the time of the capture was about fifty. The cattle at the time of the depredation were in charge of eight persons. The attack was made by daylight. The Indians fired on the men in charge and the men took refuge behind their wagons. Two of the Indians were taken off as if dead.

Upon these records, including this finding of fact from the testimony in the case, the court found as a conclusion of law that the petition be dismissed for want of jurisdiction.

It is most respectfully submitted that the ultimate fact of the identity of the depredators being determined and not being reviewable by this court, that the conclusion of law reached by the court as to its jurisdiction, or, rather, as to its want of jurisdiction, is fully shown by the documents submitted and by the testimony offered in support of the claim by the claimants in the court below, which showed an engagement between the parties in charge of the cattle and the defendant Indians, numbering about fifty, which number, according to the census of the tribe given by their agent, would represent about the number of warriors the tribe would afford.

Upon these two propositions it is submitted there was no error in the court below.

### III.

The question of the amity of the defendant Indians—in fact, the question of amity as a general question on the part of an Indian tribe—can best be determined by the reports of the governmental officials having jurisdiction over this matter. These reports are usually the reports of the Interior Department, including therein the reports of the agents and subagents for the Indians and the reports of the War Department, which generally includes the reports of the army officers in charge of the expeditions against the hostile tribes.

Since jurisdiction was conferred upon the Court of Claims by the act of March 3, 1891, the court has universally looked to these reports to determine the question of amity, which policy has been adopted and followed by

this court. It is most respectfully submitted that this ground of error assigned by appellants is not sound. It is respectfully submitted that the judgment of the Court of Claims dismissing the petition for want of jurisdiction should be affirmed.

*Marks v. U. S. et al* (161 U. S., 297).

*Leighton v. U. S. et al* (161 U. S., 291).

*Valk v. U. S. et al* (168 U. S., 703).

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